STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2014
v	No. 314333 Oakland Circuit Court
DON MURPHY, Defendant-Appellant.	LC No. 2012-240730-FC

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of three counts of assault with intent to commit murder, MCL 750.83, four counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and assault with intent to commit great bodily harm, MCL 750.84. The prosecutor did not use due diligence to secure the presence of at least one witness at trial and therefore the court should not have allowed the prosecutor to present that witness's preliminary examination testimony. Although this error violated defendant's right to confront the witnesses against him, defendant is not entitled to relief given the substantial admissible evidence presented against him. Moreover, contrary to defendant's appellate challenge, evidence that he may have participated in an attempt to bribe a witness was admissible at trial. We affirm.

I. BACKGROUND

On February 13, 2012, defendant and Christopher Buccannion physically assaulted Everett Felton inside Prue's Bar in Pontiac.[1] Apparently fueled by racial animus, the Caucasian assailants beat the African-American victim with their fists and bar stools. The incident was captured by the bar's security cameras.

[1] Defendant and Buccannion were tried together before a single jury but with separate counsel. The jury convicted Buccannion of one count of assault with intent to do great bodily harm less than murder, MCL 750.84.

After the assailants left, the severely injured Everett stood up and left the bar. Everett walked to a nearby relative's home. Fearing additional violence, the relatives would not let Everett enter. His cousin called his sister, Micarle Felton, advising her of Everett's injuries. Everett then walked to Huron Plaza Store and the owner administered first aid and contacted the police.

Micarle found Everett at the store and he told her about the events at the bar. Everett's friend, Tanesha Hill, also entered the store to make a purchase and learned of Everett's assault. Buccannion then walked in, Everett identified him as one of the attackers, and Everett, Micarle and Hill chased him outside. Buccannion yelled to defendant, who was sitting in a car parked outside. Defendant jumped out of the vehicle and retrieved a revolver. Defendant fired four or five shots, striking Micarle in the back, Hill in the arm, and Everett in the leg. All three were transported to the hospital for treatment.

II. LOCATING WITNESSES FOR THE PROCEEDINGS

At defendant's and Buccannion's joint preliminary hearing on March 15 and 19, 2012, all three victims of the February 13 events testified. Micarle was the first to take the stand and she expressed her displeasure with being forced to participate in the proceedings. An officer brought her to the courthouse to ensure her participation. She was argumentative with the defense attorneys and the court, eventually exclaiming, "I'm sorry, Your Honor, I'm just frustrated. They making [sic] me do this." Micarle identified "they" as "[t]he police" and claimed she had only learned that she would be required to testify an hour earlier. Hill did not appear on the first day of the preliminary examination and officers had to secure her presence as well. Hill was more cooperative once on the stand.

Trial was originally scheduled for July 13, 2012, but was rescheduled due to a conflict with the court's and attorneys' schedules. On September 15, the parties returned for trial, which had to be postponed again because the court was conducting a jury trial in another matter that had run over. Trial was then pushed back to November 29, 2012.

At the onset of defendant's and Buccannion's joint trial, the prosecutor noted that Everett Felton had been arrested and was in jail awaiting trial in an unrelated case. Everett would therefore be transported to the courthouse to testify. Neither Micarle Felton nor Hill was present, however. The prosecutor sought admission of the witnesses' preliminary examination testimony. The court conducted a hearing to determine whether the prosecutor had used due diligence to secure the witnesses' presence at trial. Oakland County sheriff's detective John MacDonald testified about his attempts to locate Hill and Micarle. MacDonald claimed that he made attempts to locate the female victims each time the trial was scheduled, but was never able to serve them.

MacDonald indicated that he left a subpoena for Hill at one of her prior addresses with a man who claimed Hill still lived there. The detective contacted the sheriff's department fugitive team for assistance in locating the witnesses, but the responding sergeant said the department was too busy to help. MacDonald searched the databases of several local county jail systems to determine if the witnesses had been incarcerated and "CLEMIS" to ascertain whether either had had a run in with any police agencies. He contacted local hospitals and the Oakland County

medical examiner to ascertain whether the witnesses were injured or dead. He used a system called "Accurate" to trace any known addresses of Hill, Micarle, or their relatives. The phone numbers MacDonald collected from the witnesses seemed to be invalid. He left approximately 20 messages at the number provided by Micarle with no response. The number provided by Hill was out of service. At one point, the detective bumped into Hill at the courthouse and she provided a new number. That number was disconnected shortly thereafter. MacDonald did not attempt to contact the phone companies to track down the witnesses' numbers. The detective claimed he spoke to witness Everett, but he did not know the whereabouts of his sister.

The court ruled that the prosecutor had used due diligence in searching for the witnesses. Accordingly, over defense counsels' objections, the court permitted the prosecutor to read into the record the preliminary examination testimony of Micarle and Hill.

At defendant's sentencing, however, his trial counsel created a record that MacDonald had not in fact conducted a diligent search before each rescheduled trial date. On November 9, 2012, 20 days before the final trial date, Hill was arrested and incarcerated at the Oakland County Jail. She remained incarcerated throughout the five-day trial. Had MacDonald made a timely search of the Oakland County jail system, he would have found this witness and she could have been presented at trial.

III. LACK OF DUE DILIGENCE

Defendant contends that the trial court abused its discretion when it determined that the prosecutor exercised due diligence in attempting to locate Hill to produce her at trial. He therefore requests a new trial. While the prosecutor did not employ due diligence, we discern no error requiring relief. Even absent the preliminary examination testimony of Hill and Micarle, the prosecutor presented substantial evidence to support defendant's convictions.

We review for an abuse of discretion a circuit court's determination that the prosecutor exercised due diligence in obtaining the attendance of a witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Pursuant to MRE 804(a)(5), a witness is deemed "unavailable" when he or she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." In such circumstances, the proponent of evidence may present "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). See also MCL 768.26 (permitting the admission of preliminary examination testimony at trial when the witness cannot be produced). For the prosecutor in a criminal case to present prior testimony at trial, he or she must show that the prosecution "made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* While the prosecution must follow up on specific leads, *People v McIntosh*, 389 Mich 82, 87; 204

NW2d 135 (1973), "[d]ue diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

At the due diligence hearing, the court was limited to Detective MacDonald's testimony in making its determination. Based on this testimony, the detective likely could have done more to search for the victims. Although the Feltons had family in the area, the detective spoke only to Everett and his girlfriend about Micarle's whereabouts. Despite knowing three of Hill's prior addresses, Detective MacDonald spoke to no neighbors to cultivate leads. The absence of these "more stringent efforts" did not render the detective's conduct unreasonable, however. See *Bean*, 457 Mich at 684. Had Detective MacDonald actually searched for the witnesses as he described before each rescheduled trial date, the court's conclusion that due diligence had been employed would be accurate. Yet, Detective MacDonald gave a false impression that he had undertaken the described steps to find the witnesses before each trial date, including searching the databases of local penal institutions. As Hill had been housed in the Oakland County Jail for 20 days before the final trial date, Detective MacDonald obviously had not made a timely inquiry into her whereabouts. Accordingly, the prosecutor clearly did not use due diligence in searching for Hill and may not have used due diligence in searching for Micarle.

Absent due diligence, the preliminary examination testimony of Hill and Micarle should not have been admitted at defendant's trial. And the court should have instructed the jury that it could "infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *People v Eccles*, 260 Mich App 379, 388; 580 NW2d 390 (1998). See also CJI2d 5.12.

Yet, reversal is not required simply because an error occurred. When facing a "preserved, nonconstitutional error," relief is only required when a review of the entire record leads this Court to conclude that a "miscarriage of justice" would occur if the conviction is allowed to stand. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). "The object of this inquiry is to determine if it affirmatively appears that the error asserted undermines the reliability of the verdict." *Id.* (quotation marks and citation omitted). Reversal is warranted when the error "more probabl[y] than not . . . was outcome determinative." *Id.* at 495-496.

The prosecutor presented significant evidence linking defendant to the charged offenses related to Hill and Micarle. Everett testified at trial that defendant was the individual who exited the parked vehicle in the store parking lot and opened fire on him, Hill, and Micarle. The emergency room doctor who treated the victims and the sheriff's deputies that responded to the party store testified regarding Hill's and Micarle's gunshot wounds. The store owner testified that he knew Everett, Micarle, Hill, and codefendant Buccannion as they were all frequent customers. The store owner described Everett's arrival at the store and his decision to contact the police. The owner continued that Micarle and Hill came into the store and assisted Everett. He corroborated that Buccannion subsequently entered and that Everett identified the man as his attacker. The store owner watched Buccannion run from the store with Everett, Micarle, and Hill in pursuit. He heard three to five gunshots from the parking lot and went to the door to look out. The store owner saw another white male, not Buccannion, holding a gun. And video evidence from Prue's Bar placed defendant with Buccannion on the evening of February 13, 2012, and as the other individual involved in the assault of Everett. The jury could infer from this circumstantial evidence and Everett's direct identification that defendant was the shooter outside

of the party store. This conclusion could be reached even absent Micarle's and Hill's testimony. As such, defendant cannot show that the improper admission of the preliminary examination testimony was outcome determinative.

IV. CONFRONTATION RIGHTS

Defendant contends that because Hill was incarcerated and actually available to be brought to his trial to testify, the use of her preliminary examination testimony violated his constitutional right to confront the witnesses against him. In *Bean*, 457 Mich at 682-683, the Supreme Court explained, "the constitutional right to confront one's accusers would not be violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution had exercised both due diligence to produce the absent witnesses and that the testimony bore satisfactory indicia of reliability."

Bean acknowledged the importance of the defendant's right to question the witnesses against him despite the prosecutor's inability to locate them:

> "[T]he purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial. This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors. . . . Demeanor evidence is important." [*Id.*, quoting *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988) (alterations in original).]

As discussed above, the prosecutor's efforts to locate Hill did not constitute due diligence. Given the ease with which the prosecutor could have located Hill and the misleading information provided at the due diligence hearing, the prosecutor may not have exercised due diligence in searching for Micarle either. Absent due diligence, the trial court violated defendant's confrontation rights by admitting Hill's and possibly Micarle's preliminary examination testimony at trial. Nonetheless, "[a] constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), quoting *Neder v United States*, 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Given the substantial evidence cited above, a rational jury would have convicted defendant, even without Hill's or Micarle's testimony, rendering this error harmless.

V. WITNESS TAMPERING

Defendant also challenges the trial court's admission over his objection of Everett's testimony that Buccannion and possibly defendant attempted to bribe him not to testify. The decision whether to admit evidence is within the trial court's discretion. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Furthermore, "a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." *Id.* Overall, such evidence is admissible because it is relevant to establish a defendant's guilty

conscience. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010), citing MRE 401 and 402.

On cross-examination by codefendant Buccannion's counsel, Everett responded affirmatively when asked, "Do you remember writing a note and having it delivered to Mr. Buccannion, telling him that, for $3500 hush money, you wouldn't testify in court?" Everett clarified upon questioning by defendant's counsel that "he," meaning Buccannion, "wrote me a note, and I responded" by seeking "hush money." When the prosecutor conducted redirect examination, he introduced the idea that both defendant and Buccannion were involved in the bribe: "Did the *defendants* contact you about being paid off not to testify in this case before you wrote that note?" (Emphasis added.) Everett indicated that he heard from "the[m]" "[q]uite a few times" both orally and in writing. He further claimed that the messages came from both defendant and Buccannion, but then backtracked, stating, "I'm not sure because it didn't have a name to the letter I received" and he threw the letter away. Everett also implied that both defendant and Buccannion communicated with him through "guys," who tried to convince him to take the pay-off and avoid being labeled a "snitch."

This evidence was admissible pursuant to *Sholl*, 453 Mich at 740, and *Schaw*, 288 Mich App at 236-237. Whether defendant was involved in the scheme to bribe Everett was a question for the jury to decide. The conflicting information went to the evidence's weight, not its admissibility. See *People v Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996); *People v Hintz*, 62 Mich App 196, 203; 233 NW2d 228 (1975). Thus, the trial court did not abuse its discretion by allowing Everett to testify that defendant tried to bribe him.

We affirm.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher